NO. 91-458

In the Supreme Court of the United States

OCTOBER TERM, 1991

RIVERSIDE MARKET LIMITED PARTNERSHIP, ET AL.,
(Philip C. Witter; Gordon H. Kolb; Hirschel T. Abbott, Jr.; Philip Gensler, Jr.; George G. Villere; G. Walter Loewembaum; Lillian Shaw Loewembaum; Leon T. Reymond, Jr.; George V. Young; Michael R. Schneider)

Petitioner

VS.

T. GENE PRESCOTT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I.

WHETHER THE COURT OF APPEALS OF THE FIFTH CIRCUIT ERRED IN UPHOLDING THE GRANT OF SUMMARY JUDGMENT WHEN, IN CONFLICT WITH THE EIGHTH AND SECOND CIRCUIT PRECEDENTS, IT REASONED THAT THE MAJORITY STOCKHOLDER AND ACTIVE MANAGER OF A CORPORATION CANNOT BE HELD LIABLE AS AN "OWNER OR OPERATOR" FOR THE BUSINESS' IMPROPER DISPOSAL OF HAZARDOUS WASTE UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 ("CERCLA"), 42 U.S.C.A. § 9601, et seq.?

II.

IN ENACTING CERCLA, DID CONGRESS INTEND THAT SHAREHOLDERS, OFFICERS, AND DIRECTORS OF A CORPORATION WHO ACTIVELY PARTICIPATED IN THE MANAGEMENT AND EFFECTIVELY CONTROLLED THE OPERATIONS OF THE CORPORATION, SHOULD ESCAPE LIABILITY ON THE GROUNDS THAT ONLY THE CORPORATION, AND NOT THE INDIVIDUALS ACTING ON BEHALF OF THE CORPORATION, COULD BE HELD LIABLE AS OWNERS AND OPERATORS?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Riverside Market Development Corp., et al., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding May 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 931 F.2d 327 (5th Cir. 1991) and is reprinted in the appendix, p. App. 1-16, infra.

The opinion of the United States District Court for the Eastern District of Louisiana (Wicker, D.J.) is reported at 1990 WL 72249 (E.D.La. May, 23, 1990) and is reprinted in the appendix, p. App. 17-42, infra.

JURISDICTION

Invoking federal question jurisdiction, Petitioner brought this suit pursuant to 28 U.S.C. § 1331 and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C.A. § 9601, et seq., as amended, against a corporation, International Building Products ("IBP"), and two individuals, T. Gene Prescott ("Prescott") and Gerard von Dohlen ("von Dohlen"). Appended to the suit were several state law claims that are irrelevant to these proceedings. Von Dohlen and Prescott filed a Motion for Summary Judgment, asserting that, as officers, directors, and shareholders, they were immune from liability under CERCLA. The district court granted in part and denied in part the Motion for Summary Judgment, as per the

Court's Minute Entry dated May 22, 1990; the court granted the motion as to Petitioner's claims against Prescott under CERCLA, but denied it as to Petitioner's claims against von Dohlen. The District Court entered a final judgment on July 3, 1990, amending an earlier judgment entered on June 22, 1990. On July 13, 1990, Petitioners appealed the District Court's judgment dismissing the CERCLA action as to Prescott. The Fifth Circuit affirmed the District Court's decision on May 15, 1991.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980

("CERCLA"), 42 U.S.C.A. §§ 9601(20)(A), 9601(21), 9607(a) (1986) are reprinted in the Appendix, p. App. 44-49, infra.

STATEMENT OF THE FACTS

This case arises from the activities engaged in by a corporate entity, IBP, which was formed in 1980 by two individuals, Prescott and von Dohlen. Prescott held eighty-five percent of the stock and acted as Chairman of the Board, secretary, and financial consultant; von Dohlen held fifteen percent of the stock and acted as president and CEO. In 1981, IBP purchased an existing asbestos manufacturing facility ("facility") in uptown New Orleans; IBP continued to use the facility to process asbestos.

Petitioner, Riverside Market Development Corp. ("RMDC"), purchased the facility for the purpose of converting it into its

present state, a shopping center. Pursuant to the Comprehensive Environmental Response Corporation and Liability Act, 42 U.S.C.A. § 9601, et seq., ("CERCLA"), Riverside and its assignees sued IBP and its two stockholders, Prescott and von Dohlen, for the costs of cleaning up hazardous wastes.

The facts as to the IBP's ownership of the facility are as follows. By March 11, 1981, IBP was incorporated pursuant to the state laws of Delaware. As stated above, IBP had only two shareholders; the Respondent, Prescott, held eighty-five percent ownership, and von Dohlen held fifteen percent ownership. On March 11, 1981, IBP purchased the asbestos facility.

Prescott signed a personal note for two million dollars to finance the purchase of the facility. (Record 416) (Excerpt 25). Prescott's involvement in the corporation

also included serving in the capacities of secretary of the corporation, Chairman of the Board, and financial consultant. (Record 597, 401-402) (Excerpt 31, 13-14).

As President, Von Dohlen was the only other officer; he also served as a director. From 1981 until 1984, or for more than 75% of the time IBP operated the facility, Prescott and von Dohlen remained the only shareholders, officers and directors. As of December 2, 1988, Prescott and von Dohlen were still the only officers and directors of record (Record 304) (Excerpt 4).

While IBP owned the facility, from March 1981 until May 1985, every product the facility manufactured contained raw asbestos fibers; the manufacturing process resulted in the creation of asbestos wastes. (Record 594) (Excerpt 29). (See

also Plaintiff's Statement of Undisputed Facts not contested by the defendant). In 1987, RMDC purchased the facility and began the cleanup for which costs are sought in this dispute. (Record 594) (Excerpt 29).

STATEMENT OF THE CASE

The Fifth Circuit's definition of "owner or operator" pursuant to the terms of CERCLA is in direct conflict with the definitions established by the Second and Eighth Circuits. The Respondent claims that he should not be held liable because his position as officer, shareholder, and director made him immune from liability as an owner or operator of the facility in question. Congressional intent and the Second and Eighth Circuits' definition of owner or operator indicates otherwise; under these facts, the Fifth Circuit should have held that Prescott was potentially liable and thus reversed the grant of summary judgment as to Prescott. Respondent qualifies as an owner or operator of the facility, and, as such, should be held liable for cleanup costs.

The question then to be addressed is did Congress intend for the majority stockholder, chairman of the board, officer, consultant, and active manager of a corporation to escape liability for that corporation's improper disposal of hazardous waste? In 1980, Congress enacted CERCLA as a solution to the environmental problems facing the nation as a result of the improper disposal of, and consequent contamination from, hazardous waste. Congress intended to liberally impose liability upon those parties who benefitted from the activities of a facility which disposed of hazardous waste. Therefore, Congress imposed cleanup costs on any person owning or operating a facility which disposed of hazardous waste. 42 U.S.C.A. § 9607(a)(ii) (West Supp. 1990). Congress defined owner or operator in such a manner

as to encompass corporations and individuals who owned or operated a facility which disposed of hazardous waste. CERCLA, 42 U.S.C.A. § 9601(20)(A), 9601(21). Courts would determine whether a party was an owner or operator and therefore liable for the cleanup costs.

ARGUMENT

THE COURT OF APPEALS OF THE FIFTH CIRCUIT ERRED IN UPHOLDING THE GRANT OF SUMMARY JUDGMENT WHEN, IN CONFLICT WITH THE SECOND AND EIGHTH CIRCUIT PRECEDENTS, IT REASONED THAT THE MAJORITY STOCKHOLDER AND ACTIVE MANAGER OF A CORPORATION CANNOT BE HELD LIABLE AS AN "OWNER OR OPERATOR" FOR THE BUSINESS' IMPROPER DISPOSAL OF HAZARDOUS WASTE UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 ("CERCLA"), 42 U.S.C.A. § 9601, et seq.

IN ENACTING CERCLA, CONGRESS DID NOT INTEND THAT SHAREHOLDERS, OFFICERS, AND DIRECTORS OF A CORPORATION WHO ACTIVELY PARTICIPATED IN THE MANAGEMENT AND EFFECTIVE CONTROLLED THE OPERATIONS OF THE CORPORATION, SHOULD ESCAPE LIABILITY ON THE GROUNDS THAT ONLY

THE CORPORATION, AND NOT THE INDIVIDUALS ACTING ON BEHALF OF THE CORPORATION, COULD BE HELD LIABLE AS OWNERS AND OPERATORS.

In this action, the Fifth Circuit conferred immunity on an individual who occupied the positions of majority shareholder, secretary, Chairman of the Board, and financial consultant of a corporation that had only one other officer/shareholder. The rationale of both the Fifth Circuit and the district court was that such an individual was immune from liability under CERCLA because he was not in direct operational control of the corporation's disposal of asbestos, its only product.

The Fifth Circuit's decision in this case conflicts with the holdings of the Second and Eighth Circuits and numerous district courts which have addressed this

issue and with the holdings of other courts which have addressed analogous issues. The Second and Eighth Circuits have recognized that shareholders, officers, and directors of a corporation may be held liable under CERCLA if they actively participated in the management and operation of the corporation; in contrast, the Fifth Circuit held that those individuals are shielded from liability by principles of limited liability.

This action presents the precise situation for review by writ of certiorari contemplated by U.S. Supreme Court Rule 10.1(A); it presents an important question of statutory interpretation concerning who will bear the cost of cleaning up the nation's hazardous waste. Specifically, that question concerns who qualifies as an owner or operator of a facility as those

terms are used under 42 U.S.C.A. § 9607(a) and as those terms are defined under 42 U.S.C.A. § 9601(20)(A). The cleanup of hazardous waste is an expanding government program, making resolution of the issue increasingly crucial.

Although this case deals with the cleanup costs of a former asbestos manufacturing plant, the decision in this matter as to the scope of liability as it regards owners and operators will have significant ramifications for a plethora of lawsuits concerning the potential liability of hundreds of parties for the cleanup of waste disposal sites.

The Fifth Circuit's decisions have also differed from other courts in another issue of the scope of liability under CERCLA. Specifically, the Fifth Circuit has held that a parent corporation cannot be held

liable for the actions of its subsidiary in failing to comply with the requirements of CERCLA; the First Circuit and numerous district courts have held that a parent corporation can be held liable for its actions in operating its subsidiary if the subsidiary fails to comply with CERCLA's mandates.

Congress enacted CERCLA in order to redress problems associated with the disposal of and contamination from hazardous waste. The statute was remedial; thus, liability under it should be interpreted liberally. The Fifth Circuit has unnecessarily construed the statute narrowly, thus failing to impose liability for cleanup on the parties in the best position to remedy the situation.

Unless this Court overturns the Fifth Circuit's narrow approach to liability, the

Fifth Circuit will persist in its refusal to impose liability upon parties who should be held responsible for cleanup costs and, in many instances, there will be no one to pay for the cleanup of hazardous substances. Certiorari is sought in this matter to prevent such a restricted reading of the persons liable for cleanup costs under CERCLA.

a. The legislative history of CERCLA clearly manifests Congressional intent to impose liability upon any persons who are in a position to execute the cleanup plan for the facility in question.

CERCLA was enacted in response to the increasing public concern about the environment in general and the problems of the disposal of and contamination from hazardous waste in particular. CERCLA is

a remedial statute intended to improve the environment in order to perpetuate the health and well-being of the people. It was designed to bring order to partly redundant and partly inadequate federal hazardous substances cleanup and compensation laws. F. Anderson, D. Mandelker & A. Tarlock, Environmental Protection: Law and Policy (1984). Congress intended that those who plant their pollutant seeds should pay for the fruits they bear. S. Rep. No. 848, 96th Cong., 2d Sess. at 13. Failure to apply CERCLA to owners and operators would thwart the congressional purpose of holding liable for cleanup costs those who reap the benefits of improper hazardous disposal.

b. Courts other than the Fifth Circuit have uniformly and consistently fulfilled the

Congressional intent to impose liability under CERCLA upon shareholders, directors, and officers of corporations who actively participate in and manage the affairs of the corporation.

United States v. Northeastern Pharmaceutical ("NEPACCO"), 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848, 108 S.Ct. 146 (1987) and State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) are in conflict with the Fifth Circuit's decision in this case.

In NEPACCO, supra, the court said:

> [C]onstruction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and

> disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme.

Id. at 743. The court imposed liability upon John W. Lee, the vice-president and shareholder of the corporation and supervisor of its manufacturing plant. Id. at 742. Lee was found liable because, as a plant supervisor, he actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of hazardous waste. The court said that an individual who actually participates in conduct that violates CERCLA can be held personally liable. Id. at 744.

In Shore Realty, supra, the court held that Donald LeoGrande, an officer and stockholder of Shore Realty Corp.

("Shore"), was jointly and severally liable with Shore under CERCLA. The court read the statute and, particularly, the definition of owner and operator, which excludes "a person, who, without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the facility," to imply that an owning stockholder who manages the corporation is liable under CERCLA if the corporation is liable. Id. at 1052. Since LeoGrande incorporated Shore solely to purchase the property at issue and since he made, directed, and controlled all corporate decisions, the court held that he was liable as an operator under CERCLA. Id. at 1052.

Indeed, the vast majority of those courts, excepting the Fifth Circuit, have

held that those persons who actively participate in management are potentially liable for cleanup costs incurred as a result of improper disposal by the corporation. The other courts have held that persons associated with the corporation are potentially liable as individuals; furthermore, courts other than the Fifth Circuit have in fact held such persons liable in numerous cases.

In a district court decision, United States v. Fleet Factors Corp., 724 F.Supp. 955 (S.D.Ga. 1988), aff'd 901 F.2d 1550 (11th Cir. 1990), reh'g denied 911 F.2d 742 (11th Cir. 1990), cert. denied 111 S.Ct. 752 (1991), Horowitz and Newton, the sole shareholders of a printing facility, were held liable under CERCLA. Id. at 962. The court based its decision that Horowitz and Newton qualified as owners and operators

on the undisputed fact that Horowitz and Newton actively managed the facility. Id. at 961.

Kelley v. Thomas Solvent Co., 727 F.Supp. 1554 (W.D.Mich. 1989), held that corporate individuals were potentially liable for CERCLA violations. It reasoned:

> CERCLA's statutory scheme varies the configuration of traditional corporate principles which prevent individual liability absent a conclusion that an individual engaged in procedural irregularities justifying a court in "piercing of the corporate veil" or that an individual has had close, active involvement or direct supervision in the events leading to the alleged tortious harm.

Id. at 1560. The court went on to cite

NEPACCO, supra, Shore Realty, supra, and several district court cases in concluding that the weight of authority holds that, in some circumstances, under CERCLA or related statutory schemes, a court may find an individual personally liable for unlawful hazardous waste practices where strict traditional corporate principles do not apply. Id. at 1561. The court said the relevant inquiry for deciding whether to hold an individual liable is whether he could have prevented the hazardous waste discharge at issue.

The court refused to dismiss the plaintiff's claim in Kelley ex rel. Michigan NRC v. Arco Industries, 721 F.Supp. 873 (W.D.Mich. 1989), because the court found the defendants were potentially liable for CERCLA violations as shareholders or officers and directors of

Arco. The court cited numerous cases in stating:

> [T]he case law suggests that corporate officers can be held liable under CERCLA for unlawful disposal of hazardous waste.... The decisions that concern "owners or operators" under § 107(a)(1) base liability decisions on the individual officer's knowledge, responsibility, opportunity, control, and involvement in the disposal process.

Id. at 878. Defendants Matthaei and Ferguson were potentially liable under CERCLA because Matthaei had "overall responsibility for operation and management" of the site and Ferguson "directly oversees the operation and management of the plant." Id. at 879, citing Complaint paras. 11, 12.

Numerous other district court cases have similarly held corporate individuals liable under CERCLA. United States v. Carolawn Co., 14 Env't L.Rep. 20,699 (D.S.C. 1984) (held that three corporate officers were personally liable under CERCLA); United States v. Conservation Chemical Co., 628 F.Supp. 391 (W.D.Mo. 1985) (corporation's founder, chief executive officer and majority stockholder liable under CERCLA).

c. The Fifth Circuit's declaration that a shareholder, officer, and director cannot be held liable under CERCLA is in direct conflict with Fifth Circuit holdings that corporate individuals are potentially liable as individuals and with the Fifth Circuit's definitions of owner or operator in analogous contexts.

The Fifth Circuit has repeatedly

maintained that an officer of a corporation can be held personally liable for a tort when he participates in or authorizes the commission of the tort, even on behalf of the corporation. Mozingo v. Correct Mfg. Corp., 752 F.2d 168 (5th Cir. 1985); Shingleton v. Armor Velvet Corp., 621 F.2d 180 (5th Cir. 1980) (officers who take part in the commission of a tort by the corporation may be held personally liable).

Since a corporate officer is potentially liable, he should be held liable under CERCLA if he fits the meaning of "owner or operator" as used in 42 U.S.C.A. § 9607(a) and as defined in 42 U.S.C.A. § 9601(20)(A). Section 9607(a) defines persons who are liable under private causes of action to include "... the owner and operator of ... a facility." § 9601(20)(A) defines owners and operators as follows:

> The term "owner or operator" means ... (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility.... Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Providing further guidance is the Fifth Circuit's definition of owner or operator under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., (West 1986 & Supp. 1990), which closely parallels CERCLA. The Fifth Circuit defined an owner or operator as an individual who has the "power to direct the activities of persons who control the mechanisms causing the

pollution. The owner-operator has the capacity to prevent and abate damage." United States v. Mobil Oil Corp., 464 F.2d 1124, 1127 (5th Cir. 1972).

d. The Fifth Circuit's declaration that a shareholder, officer, and director cannot be held liable under CERCLA is in direct conflict with the intentions of Congress in enacting CERCLA and with decisions of the Second and Eighth Circuits and several district courts which have addressed the issue.

The Fifth Circuit's position on this matter is contrary to legislative and judicial precedent. Congress has clearly stated that those persons who incur the benefits of improper hazardous waste disposal should be held liable for their actions. The Second and Eighth Circuits have construed liability broadly in order

to effectuate Congress' purpose. In contrast, the Fifth Circuit has construed liability narrowly, allowing parties who benefit from improper disposal to escape liability.

For instance, in Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990), cert. denied, 111 S.Ct. 1017 (1991), the Fifth Circuit declined to hold that a parent corporation was potentially liable for its subsidiary's failure to comply with the requirements of CERCLA:

> Joslyn urges this court to read CERCLA's definition of "owner or operator" liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute. ... We decline to do so.

Id. at 82. This decision is obviously contrary to Congress' intent that CERCLA,

a remedial statute, be interpreted broadly. It is likewise inimical to cases decided by other circuit and district courts in which those courts properly construed liability under CERCLA broadly. See NEPACCO, supra; Shore Realty, supra; Mobay Corp. v. Allied-Signal, Inc., 761 F.Supp. 345, 350 (D.N.J. 1991).

Similarly, the Fifth Circuit has declined to impose liability upon corporate officers under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, et seq.. Even though that statute imposes liability upon "Every person and every corporation that shall violate any of the provisions of [the River and Harbors Act]," the Fifth Circuit denied that corporate officers were potentially liable. United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976). The court said that since the Act

did not explicitly deem corporate officers liable, they were protected by principles of corporate liability.

In United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976), which was also decided under the River and Harbors Act, the Fifth Circuit again declined to impose personal liability, even though the personal involvement of the corporate officer had been clearly established. The court reasoned:

> We have today explained in Sexton, supra, that the Rivers and Harbors Act does not authorize such personal liability.

Id. at 1310. In both Sexton, supra, and Moretti, it is important to note that the Fifth Circuit did not just refuse to impose personal liability on the facts of the case, but declared that an individual could

not be held liable for the corporation's violations of the Act, regardless of the facts.

In summary, the decisions of the Fifth Circuit regarding liability of corporate officers are clearly contrary to decisions of the Second and Eighth Circuits and to the intent of Congress. In addition, the decisions run counter to the Fifth Circuit's own precedents, set forth in cases such as Mozingo, supra, and Shingleton, supra, which hold that a corporate officer may be held personally liable for the acts of the corporation. Thus, this Court should review this case in order to clarify the issue of whether a corporate individual is potentially liable for violations of CERCLA.

If this Court finds that an individual may be held liable for corporate

violations, then Prescott should be found liable as an owner or operator because he satisfies the definitions of owner or operator set forth above. He does not qualify for the exemption stated in 42 U.S.C.A. § 9601(20)(A) because he did in fact participate in the management of the facility and because the position that he occupied within the corporate structure was one from which he completely controlled the corporation. The facts clearly demonstrate his ongoing participation in monthly management meetings discussing the financial status of the New Orleans asbestos operation. He received memoranda during the operational phase of IBP which concerned the actual operations of the plant. (Record 425) (Excerpt 28). Finally, not only is he the sole other officer but von Dohlen also describes him as a

consultant for the corporation. (Record 401) (Excerpt 13).

CONCLUSION

Left standing, the Fifth Circuit's decision amounts to a carte blanche for individuals to shield themselves with straw corporations in order to effect the dastardly deed of toxic disposal. They may own and control the company so long as they are not the persons charged with pushing the right buttons.

Because the Fifth Circuit's decision conflicts with holdings of the Second and Eighth Circuits, it will cause great uncertainty regarding the potential liability of shareholders, officers, and directors of a corporation for the corporation's failure to comply with the requirements of CERCLA. The Fifth Circuit's decision will allow persons to

incur the benefits of improper disposal of hazardous wastes without paying the costs associated with their actions.

Petitioner respectfully requests that this Court grant certiorari on the issue of whether it is proper to exempt shareholders, officers, and directors of a corporation from liability under CERCLA.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of August, 1988 to Ralph S. Hubbard III, Friend, Wilson, & Draper, LL&E Tower, Suite 2600, 909 Poydras Street, New Orleans, LA 70112-1017, and to each other party to this action by depositing same in the United States mails, properly addressed to his, her or its counsel of record, first class postage prepaid.

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By: _____
SCOTT R. BICKFORD
JOHN R. MARTZELL

STATE OF LOUISIANA)
)SS
PARISH OF ORLEANS)

SWORN TO AND SUBSCRIBED before me the undersigned authority this 13th day of August, 1991.

_____
Regina O. Matthews
NOTARY PUBLIC
State of Louisiana

APPENDIX

App.

[FILED MAY 15, 1991]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-3531

RIVERSIDE MARKET DEVELOPMENT CORP.,
ET AL
PLAINTIFFS-APPELLANTS

V.

INTERNATIONAL BUILDING PRODUCTS, INC.,
ET AL

Appeal from the
United States District Court
for the Eastern District of Louisiana
Honorable Veronica Wicker,
District Judge, Presiding
Argued and submitted _____

MEMORANDUM

Before: THORNBERRY, HIGGINBOTHAM
and BARKSDALE
CIRCUIT JUDGES

PER CURIAM:

The appellants, a group of developers, purchased an asbestos product manufacturing facility in New Orleans, Louisiana and

converted the facility site into a shopping center. Invoking the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. §§ 9601-9657 (West 1983 & Supp. 1990), the appellants sought to recover cleanup costs from an officer and former majority shareholder of the asbestos product manufacturing facility. The district court granted the corporate officer's motion for summary judgment finding that no genuine issue of material fact existed to show that the officer was an "owner or operator" of the asbestos manufacturing facility within the meaning of CERCLA. After conducting a de novo review of the record, we agree with the district court's finding, and, therefore, we AFFIRM

I.

FACTS AND PROCEEDINGS BELOW

This case arises from the purchase, demolition and cleanup of an asbestos manufacturing plant that had been operating on Tchoupitoulas Street at the foot of Jefferson Avenue in the middle of uptown New Orleans, Louisiana for some fifty-seven years. The plant had operated under the control of R. J. Dorn Corporation and Asbestone Corporation for twenty-five years, followed by twenty-eight years of operation under the ownership of National Gypsum Company. In 1981, National Gypsum sold the entire operation to International Building Products ("IBP"), a Delaware corporation and a defendant in the district court. After the sale, IBP continued to employ the entire National Gypsum work

force, approximately 230 people, and the facility continued to manufacture asbestos products.

At the time of the purchase of the asbestos plant, IBP had two shareholders, T. Gene Prescott, holding eighty-five percent. See Record of Appeal, Vol. 2 at 402 and 405. Prescott held the positions of secretary of the corporation, consultant and chairman of the board, see Record on Appeal, Vol. 1 at 93; Vol. 2 at 304 and 401, while von Dohlen served as the company's president and chief executive officer, see Record on Appeal, Vol. 2 at 304 and 395. Prescott lived in New York and visited the New Orleans facility only two to four times a year. See id. at 403. The purposes of these visits included: attending the annual Christmas party,

attending a meeting for an Erectors' Association,s one of whose members were IBP customer, and brief visits with executive personnel. See Record of Appeal, Vol. 1 at 93. As an IBP officer, Prescott reviewed financial statements regularly and von Dohlen testified that "[d]uring meetings of officers, [Prescott] consulted with me or other people but that's about it." See id. Von Dohlen took a more active part in the in the day-to-day operations of the plant, spending approximately forty percent of his work week at the New Orleans factory and negotiating contracts with various fiber suppliers to supply raw asbestos to the plant. See id at 395-96 and 407.

IBP continued to operate the asbestos plant until 1985 when a continuing decline

in the market for asbestos products forced IBP to shutdown the operation. Soon after the closing of the facility, IBP was contacted by Gordon Kolb, president of Riverside Market Development Corporation ("RMDC"), who negotiated to purchase the site in order to develop a shopping center. IBP lowered its original asking price of $3,400,000 by $410,000 in return for Kolb's promise to undertake demolition of the facility on his own and relieving IBP of that obligation. Both Louisiana and federal law require that, prior to demolition of any building, all friable asbestos must first be removed. RMDC purchased the plant site at the reduced price in November 1985 and later transferred title to the property to Riverside Market Limited Partnership

("RMLP"). Cleanup of the site was completed in 1986. In December 1988, RMDC sued IBP as well as its two corporate officers, von Dohlen and Prescott, to recover for cleanup costs. RMDC alleged that IBP had improperly disposed of hazardous wastes including asbestos and by-products of the asbestos manufacturing process. RMLP was later added as a plaintiff by RMDC's second amended complaint. See Record on Appeal, Vol. 1 at 186. Still a third amended complaint substituted twelve individuals, all former partners in RMLP, as plaintiffs to replace RMDC and RMLP. See Record on Appeal, Vol. 1 at 104. The plaintiffs based their claims against the individual officers of IBP on § 9607(a) of CERCLA which states in relevant part that "any person who at the

time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of ... shall be liable for [cleanup costs]."[1] 42 U.S.C.A § 9607(a) (West Supp.1990).

In March of 1990, the defendants filed a Motion for Summary Judgment arguing among other things that the individual officers of IBP were not "owners or operators" as defined by CERCLA. In response to that motion, District Court Judge Veronica D. Wicker dismissed plaintiffs' complaint in its entirety as to T. Gene Prescott.[2]

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[1] Another section of CERCLA, 42 U.S.C.A. §9613 (f)(1), provides that a party who removes hazardous wastes as required by the Act may seek contribution from "any other person who is liable ... under section 9607(a)."

[2] The court did not dismiss the suit as to von Dohlen, finding that a genuine issue of material fact existed as to whether or not von Dohlen was an "operator"

Plaintiffs filed a timely appeal and now contest the court's dismissal of their CERCLA action only as it applies to T. Gene Prescott. Therefore, the issue presented for our review may be stated as whether or not Prescott, a majority shareholder and office of IBP, may be held personally liable for cleanup costs as an owner or operator of the asbestos manufacturing facility under § 9607(a) of CERCLA.

DISCUSSION

I. Standard of Review

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of the asbestos plant as defined by CERCLA. See Record on Appeal, Vol. 3 at 598. The district court did order a judgment in favor of both von Dohlen and IBP with regard to portions of the plaintiffs' complaint that alleged causes of action for public nuisance and causes of action arising under the Louisiana Environmental Quality Act. See id at 605. These additional findings have not been contested on appeal, and we will therefore ignore them for purposes of this opinion.

In reviewing a district court's grant of summary judgment, we review the evidence de novo and apply the same criteria as that used by the lower court. Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed. 2d 202 (1986). For the purposes of this case, the defendant, Prescott, may rest his motion for summary judgment on the absence of evidence to support the plaintiffs' claim that he was an "owner or operator" of the asbestos plant at the time that the CERCLA violations took place. See Celotex Corp. v. Catrett 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed. 2d 265 (1986). The plaintiffs may not defeat

Prescott's motion for summary judgment with "evidence [which] is merely colorable or is not significantly probative." Liberty Lobby, 477 U.S. at 249-50, 106 S.Ct. at 2511 (citations omitted). The plaintiffs must instead come forward with "significant probative evidence demonstrating the existence of a triable issue of fact." Southmark Properties v. Charles House Corp., 742 F.2d 862, 877 (5th Cir. 1984).

II. Owner or Operator under CERCLA.

[1] Under 42 U.S.C.A. §9601 (20)(A), CERCLA defines "owner or operator" as "any person owning or operating' a facility, and it specifically excludes any "person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."

Prescott's position as majority shareholder of IBP did not make him an owner of the asbestos manufacturing plant. The plant was purchased by the IBP corporate entity and not by Prescott. "The property of the corporation is its property, and not that of the stockholders, as owners." 1 C. Keating & G. O'Gradney, Fletcher Cyclopedia of the Law of Private Corporations § 31 at 555 (1990).

[2] We now turn to the question whether Prescott could have been considered an "operator" of the asbestos plant during the time that the plant was owned by IBP. Because CERCLA was a hastily drafted Act and passed through a lame-duck Congressional session,[3] it is not

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[3] See Developments in the Law - Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1465 & n.1 (1986); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H.

surprising that the statute does not explicitly describe the defining character of an "operator" as used within the statute. While we can conceive of situations where an individual director, officer or employee of a corporation may be considered an "operator" of a manufacturing facility as defined by CERCLA, this suit, does not present such a situation.

Under traditional concepts of corporate law, the principle of limited liability would protect officers or employees like Prescott from being held responsible for the acts of a valid corporation. However, CERCLA prevents individuals from hiding

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1985) ("CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history.").

behind the corporate shield, when as "operators," they themselves actually participate in the wrongful conduct prohibited by the Act. See 42 U.S.C.A. § 9607(a) (West Supp. 1990) ("any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of ... shall be liable [cleanup costs]."); see also S. Rep. No. 848, 96th Cong., 2d Sess. 98 (1980) (noting that society should not bear the costs of protecting the public from hazardous wastes generated by an "owner or operator who ... now wishes to be insulated from any continuing responsibilities."). In such cases, a defendant can be held individually liable for his wrongful conduct. "[T]his personal liability is distinct from the

derivative liability that results from 'piercing the corporate veil'" where we would hold the owners of a less than bona fide corporation responsible for corporate acts. United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726, 744 (8th Cir. 1986), cert denied, 484 U.S. 848 108 S. Ct. 146, 98 L.Ed 2d 102 (1987); cf. 3A S. Flanagan & C. Keating, Fletcher Cyclopedia of the Law of Private Corporations §1135 (1986) ("Corporate officers are liable for their torts, although committed when acting officially."). In determining liability in cases like the one now before us, we must look to the extent of the defendant's personal participation in the alleged wrongful conduct.

The plaintiffs in this case have failed to come forward with any evidence showing that Prescott personally participated in any conduct that violated CERCLA. The record clearly indicates that Prescott spent very little time at the asbestos plant, and no evidence has been presented to indicate that such visits would have provided Prescott with the opportunity to direct or personally participate in the improper disposal of asbestos or asbestos by-products. Prescott lived in New York and only visited New Orleans two to four times a year; and his participation in plant operations were limited to reviewing financial statements and attending meetings of the officers where he consulted with von Dohlen and others. On such sparse evidence we find that the district court

committed no error in granting summary judgment in favor of Prescott.

AFFIRMED.

[FILED 5/23/90]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RIVERSIDE MARKET DEVEL. CORP.	CIVIL ACTION #88-5317
VERSUS	
INTERNATIONAL BUILDING PRODUCTS ET AL	SECTION "L" (6)

This case arises from the demolition and clean-up of an asbestos manufacturing facility located in new Orleans, Louisiana.

On March 11, 1981, the defendant International Building Products, Inc. ["IBP"], a Delaware corporation, purchased the National Gypsum Company plant site, facility, equipment and materials and hired National Gypsum's entire work force to continue operating the plant. IBP continued to manufacture asbestos cement

products for four years. After the plant closed in March, 1985, a few IBP employees were retained to clean up the site to make it presentable for sale. In May, 1985, purchasers were found who wanted to build a shopping center on the site, so the asbestos manufacturing plant had to be demolished. IBP agreed at first to sell the property for $3,400,000 and to be responsible for tearing the building down to the slab. Later IBP reduced the selling price by $410,000 because the buyers agreed to demolish the building themselves. Louisiana and federal law required that, prior to demolition of any building, all friable asbestos first be removed.

Riverside Market Development Corporation ["RMDC"] purchased the plant site on November 7, 1985. On March 20, 1986, RMDC

transferred title to the site to Riverside Market Limited partnership ["RMLP"] and transferred to RMLP its claim for cleanup costs. Clean up was completed in August, 1986. On December 2, 1988, the plaintiffs sued IBP and its two corporate officers, Gerard von Dohlen and T. Gene Prescott, to recover clean up costs. By amended complaint, RMLP and twelve individuals have been added as plaintiffs.

The defendants filed a motion for summary judgment asking the Court to dismiss plaintiffs' complaint in its entirety against von Dohlen and Prescott; to dismiss the plaintiffs' state law claims in Count IV (arising under the Louisiana Environmental Quality Act ["LEQA"] and in Count II (a claim for unjust enrichment and public nuisance) against IBP; and to

dismiss all claims of RMDC and RMLP with prejudice.

Defendants' motions were submitted to the Court on a former date. Having considered the briefs and arguments of counsel and the applicable law, the Court ORDERS that the defendants' motion for summary judgment BE GRANTED IN PART AND DENIED IN PART:

Defendants' motion for summary judgment IS GRANTED as to all of the plaintiffs' claims against Prescott, and as to plaintiffs' state law claims against von Dohlen and IBP contained in Count IV (arising under the LEQA) and in Count II (public nuisance). Defendants' motion for summary judgment IS DENIED as to plaintiffs' claims against von Dohlen under the Comprehensive Environmental Response

Compensation and Liability Act, 42 USC § 9601 et seq. ["CERCLA"]. The Court will defer ruling on the defendants' motion as to plaintiffs' claim for unjust enrichment in Court II until the time of trial. The Court also reserves its ruling on the defendants' motion as to all claims of RMDC and RMLP until the Magistrate decides the plaintiffs' motion to substitute party plaintiffs.

LIABILITY OF PRESCOTT AND
VON DOHLEN UNDER CERCLA

"Under 42 usc §9607(A), CERCLA provides a private cause of action where a release or threatened release of a hazardous substance causes response costs to be incurred. The persons covered are:

(1) the owner and operator of ... a facility,

(2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person...,

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities..."

Tanglewood East Homeowners et al v. Charles-Thomas, Inc., et al, 849 F. 2d 1568 (5th Cir. 1988)

42 USC §9707(a)(1) covers present owners and operators; 42 USC §9607(a)(2) covers

past owners and operators. Neither von Dohlen nor Prescott ever held title to the asbestos manufacturing facility; neither can be liable as an owner under 42 USC §9607(a)(1) or 42 USC §9607(a)(2). Similarly, since demolition occurred after the sale to the plaintiffs, neither von Dohlen or Prescott qualify as present operators under 42 USC §9607(a)(1). However, CERCLA "does not limit disposal to a one-time occurrence." Tanglewood East Homeowners et al v. Charles-Thomas, Inc., et al, 849 F. 2d 1568 (5th Cir. 1988). "Disposal" may be merely the "placing of any ... hazardous waste into or on any land ..." 42 USC §6903(3). Id. Therefore if hazardous wastes were disposed of during IBP's ownership of the New Orleans facility and if Prescott and von Dohlen "operated'

the facility during that time, they would be liable under 46 USC §9707(a)(2).

42 USC §9601(20)(A) defines "operator" only in the negative: "Such term does not include a person, who, without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the ... facility." The Court then must look at the activities of Prescott and von Dohlen to determine their degree of participation in the operations of the IBP New Orleans facility.

When IBP purchased the National Gypsum plant, Prescott and von Dohlen were the sole shareholders: Prescott held eighty-five per cent (85%) of the stock and served as Chairman of the Board; von Dohlen held fifteen percent (15%) of the stock and

served as President. From March 1981 through December 1983, von Dohlen also served as Chief Executive Officer. In 1984, other shareholders invested in IBP.

Prescott lived in New York and only visited the New Orleans facility on one to three occasions per year during the time that IBP owned the plant: (1) annual Christmas party; (2) attendance at a meeting for an Erectors' Association, some of whose members used products from the plant and (3) brief visit with executive personnel. (Defendants' Exhibit B.) Von Dohlen testified that Prescott was principally the source of money. (Von Dohlen deposition, August 21, 1987, p. 130). Von Dohlen further explained that as an IBP officer, Prescott reviewed financial regularly. "During meeting of

officers, he consulted with me or other people but that's about it." (Id. at p. 131.) The Court finds no evidence that Prescott was an operator of the asbestos manufacturing facility within the meaning of CERCLA.

As to von Dohlen, however, the Court finds that a genuine issue of material fact exists as to whether or not he was an "operator" under CERCLA. Unlike Prescott, von Dohlen spent forty percent (50%) of his time in New Orleans. He testified that from March 1981 through December, 1984, he spent ten percent (10%) of his time each month at the New Orleans factory. (Von Dohlen Deposition, August 21, 1987, p. 16). Although he states in his affidavit that his major duties involved sales, he testified earlier that he was occasionally

involved in the actual day-to-day operations of the factory, that he may have operated some of the machines himself from time to time in order to solve problems in manufacturing processes, and that he was actually out on the plant floor supervising at other times. (Id. at p. 17.) Ray Plauche confirmed that through 1984, von Dohlen had an office at the plant, and was at the plant "almost every week -- for all practical purposes, three weeks out of the month." (Plauche deposition, September 24, 1987, p. 36.) In a later deposition, von Dohlen testified that from December, 1983, until the plant was sold, he visited it twice: once to meet with the buyer while operations were either still going on or had just ceased [April or May of 1985] and once for the auction/sale. (Von Dohlen

deposition, December 7, 1989, p. 23.)

As to his role in the sale of asbestos products and the disposal of hazardous wastes, von Dohlen testified that he ordered asbestos fiber from various companies and negotiated contracts with various fiber suppliers to supply raw asbestos to the plant. (Id. at p. 26.) He also explained that he participated in altering the formulations of products previously produced by National Gypsum and participated in decisions as to which formulations were to be used in those products. Despite his assertions that he was not involved in decisions about compliance with environmental regulations except for getting the required by the Environmental Protection Agency ["EPA"] permit (Id. at p. 34), von Dohlen admitted

that during his tenure, "We disposed of asbestos pursuant to licenses in the regular course of business in the plant. And we were familiar with those." Von Dohlen was not sure whether there were different regulations for removing asbestos when the plant was demolished. (Von Dohlen deposition, August 21, 1987, p. 43.)

Other evidence shows that when IBP bought the plant from National Gypsum, von Dohlen wrote the cover letter and signed IBP's application for an identification number from the Louisiana Hazardous Waste Management Program for Tchoupitoulas facility. (Plaintiffs' Exhibits 6 and 7.) Also on March 15, 1983, the State of Louisiana sent a warning letter to von Dohlen, as president of IBP, stating that an inspection revealed that a "container

of hazardous waste was not marked with required information" and giving IBP thirty (30) days to correct the violation. (Plaintiffs' Exhibit 11.). Later von Dohlen received a copy of a June 22, 1983, letter to Ray Plauche about OSHA citations. (Plaintiffs' Exhibit 16.) Then in January and March of 1984, the New Orleans Sewerage and Water Board wrote to von Dohlen, as president of IBP, about the lack of compliance with zero discharge of asbestos requirement into the public drainage system. (Plaintiffs' Exhibits 14 and 15.) All of the foregoing evidence raises a significant question about the extent of von Dohlen's participation in the operations of the IBP plant.

Recently, the Fifth Circuit refused to extend CERCLA liability to parent

corporations for the acts of their subsidiaries absent some evidence that the corporate veil had been pierced. Joslyn Manufacturing Company v. T. L. James & Co., Inc. ___F. 2d ___ (5th Cir. Jan. 19, 1990). Movers would have this Court extend Joslyn to cover corporate officers as well. This Court declines to do so for the following reasons. In the first place, even though the district court opinion in Joslyn contained dicta about corporate officer liability,[1] The Fifth Circuit confined itself to the issue of parent/subsidiary liability. Accordingly, Joslyn is clearly distinguishable; there is no

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[1] J. Stagg stated that "[n]either the clear language of CERCLA nor its legislative history provide authority for imposing individual liability on corporate officers." Joslyn Corp. v. R. L. James & Company, Inc., et al, 696 F. Supp. 222, 226 (W.D. La. 1988).

parent/subsidiary question here. In the second place, this Court is not convinced that the dicta in the district court opinion requires a different result in this case. Even though Judge Stagg declined under the facts of Joslyn to follow other Circuits which had held corporate officers liable for hazardous waste clean up under CERCLA, he nonetheless recognized that those cases represented an exception to the general rule of limited liability for corporate officers. Joslyn Corp. v. T. L. James & Company, Inc., et al 696 F. Supp. 222, 224 (W.D. La. 1988).

> These cases [State of N.Y. v. Shore Realty Corp. 759 F.2d 1032 (2d Cir. 1985); United States v. Conservation Chemical Co. 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Carolawn

Company, 21 Env't Rep. Cas (BNA) 2124 (D.S.C. 1984); United States v. Northeastern Pharmaceutical, 810 F. 2d 726 (8th Cir. 1986)] involved factual situations where the personal participation in the illegal disposal of hazardous waste by the corporate officers was significant. As one commentator has noted, these "courts have avoided the common law rule of limited liability by either explicitly or implicitly applying a generally recognized exception: a corporate officer is liable for the wrongful acts of a corporation when he personally participates in the wrongful conduct." Comment, 38 Mercer L. Rev. at 685. If T. L. James & Company and its officers and

directors had been actively involved in the day-to-day operations of Lincoln, including the disposal of hazardous waste, then, arguably, liability would attach. See generally Shingleton v. Armor Velvet Corp., 621 F.2d 180 (5th Cir. 1980) L.C.L. Theatres, Inc. v. Columbia Pictures Industries, Inc. 619 F.2d 455 (5th Cir. 1980); 'Tillman v. Wheaton-Haven Recreation Associations, Inc., 517 F.2d 1975.[2]

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[2] In Shingleton, corporate officers approved the use of fraudulent misrepresentations to induce the sale of an electrostatic decorating service. In L.C.L. Theatres, Inc., the president and principal shareholder approved and participated in fraudulently underreported box office receipt in order to avoid rent obligations. The Court said "in these circumstances, '[i]t is not necessary that the corporate veil be pierced or even discussed. An officer of any other agent of a corporation may be personally as responsible as the corporation itself for

Id., n. 20,

If, as in the cases cited by Judge Stagg, von Dohlen personally participated in the disposal of hazardous wastes, then he may be liable for the wrongful acts of the corporation even under Judge Stagg's Joslyn opinion. There are still significant unresolved questions of fact over von Dohlen's personal participation in IBP's activities. Those disputes of fact prevent the Court's granting summary judgment in von Dohlen's favor on the CERCLA issue.

LIABILITY OF ALL DEFENDANTS

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tortious acts when participating in the wrongdoing [Citations omitted.]* 619 F. 2d at 457. In Tillman,, the directors of community swimming pool association were found to be personally liable for unlawfully discriminating against black applicants because the directors had knowingly voted for discriminatory policies.

UNDER LEQA

Even though the Court finds material disputes of fact which preclude the granting of the motion for summary judgment in von Dohlen's favor based on CERCLA, the Court agrees with the defendants that there can be no liability on the part of Prescott, von Dohlen or IBP under LEQA.

Those responsible under LEQA are similar to those responsible under CERCLA[3] so

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[3] La. R.S. 30:2273 "persons who must comply with requirements of this Chapter," provides:

> (1) The owners, operator, or lessee of any pollution source or facility.
>
> (2) Any person who generated a hazardous waste which was eventually transported, stored, disposed of or discharged at a pollution source or facility.
>
> (4) Any other person who disposed of or discharged a hazardous substance at a pollution source or facility.

Prescott bears no liability as an "operator" under either statute. Plaintiffs also have no claim under LEQA against IBP as owner and against von Dohlen, even if he were found to be an "operator" under CERCLA and LEQA, for the following reasons.

LEQA is designed primarily as a remedy for the state of Louisiana.[4] It allows the

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[4] Chapter 12, "Liability for Hazardous Substance Remedial Action, La. R.S. 30:2271 Findings and Purpose" provides:

A(4) The state cannot and should not bear the costs associated with a private profit making venture.

(B) The purpose of this Chapter is to encourage prompt notification to the department of any hazardous substance ... disposal, to identify locations at which a ... disposal of a hazardous substance may have occurred at any time in the past, to provide a mechanism to the department to insure that the costs of remedial actions are borne by those who contributed to the ... disposal, and to allow the department to respond as quickly as possible to

State to "make a written demand on every owner,... operator, or other responsible person who has participated in the disposal or discharge of a hazardous substance at the site to undertake remedial actions at the site in accordance with a plan approved by the secretary or pay to the secretary the cost of the remedial action to be taken by the secretary." La. R.S. 30:2275. La. R.S. 30:2276 allows the state to recover the costs of remedial action.[5] La. R.S.

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hazardous substance discharges while retaining the right to institute legal actions against those responsible for remedial costs.

[5] La. R.S. 30:2276(A) provides
The court shall find the defendant liable to the state for the costs of remedial action taken because of any actual or potential discharge or disposal which may present an imminent and substantial endangerment to health or the environment at a pollution source os facility if the court finds that the defendant performed any of the following: ...

30:2276(F) recognizes that there may be several sources of hazardous wastes and creates a presumption of in solido liability among those sources for the costs of recovery, which presumption may be

rebutted in a court proceeding.[6] La. R. S. 30:2276(G) is the penalty provision designed for those who fail to respond to the state's demands. La. R.S. 30:2276(G) provides:

> Those participating parties who agree to clean up the pollution source or facility prior to the initiation of suit [by the State] may sue and recover from any other

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[6] La. R.S. 30:2276(F) provides: All persons who have generated a hazardous substance disposed of at the site,... or disposed of a hazardous substance at the pollution source or facility shall be presumed to be liable in solido by the court for the cleanup of the site unless a party shows by a preponderance of the evidence that the costs of remediation should be apportioned and there is a reasonable basis of determining the amount of the contribution of each party to the discharge of disposal. [H]owever, any party shall have the right to establish his proportionate contribution to the site and his liability shall be limited to his degree of contribution.

nonparticipating party who shall be liable for twice their portion of the remedial costs.

A "participating party" is a "person who undertakes remedial action after receiving a demand from the secretary in compliance with the demand and as approved by the secretary." La. R.S. 30:2272(7). In this case, the buyers of the property qualify as participating parties under the statute. They received written demand from the State to clean up the facility, which they subsequently did to the state's satisfaction. (Plaintiffs' Exhibits 19, 20, 21.) Prescott, von Dohlen and IBP, however, do not qualify as either participating or nonparticipating parties under the statute. A "nonparticipating party" is "a person who refuses to comply

with the demand of the secretary, or fails to respond to the demand, or against whom a suit has been filed by the secretary." La. R.S. 30:2272(6). There is no evidence that IBP or Prescott or von Dohlen -- the sellers -- ever received any written demand from Louisiana. To the contrary, the affidavits attached to movers' motion attest that, in fact, no written demand was received by IBP from Louisiana Department of Environmental Quality. (Defendants' Exhibits A and B.) Accordingly, the plaintiffs may not sue the defendants under LEQA and Cont IV is dismissed in its entirety.

As to the remaining claims, there was no opposition to the dismissal of the state public nuisance claim; the Court will decide at a later date the other two issues

(unjust enrichment in Count II and dismissal of RMDC and RMLP).

New Orleans, Louisiana, this 22nd day of May, 1990.

VERONICA D. WICKER

§9601 (20)(A) The term "owner or operator means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

§9601 (21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State municipality, commission, political subdivision of a State, or any interstate body.

§9607(a) Covered persons; scope, recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

(3) Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release,

or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources including the reasonable costs of assessing such injury, destruction or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under

section 9604(i) of this title.

This amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of Chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the

date on which interest accruing shall be determined with reference to the date on which interest accruing under the subsection commences.